MSS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 76 OF 1996

SHRI SHASHIKANT NAMDEO BARATHE)
Checking Inspector, Pune)
Mahanagarpalika, Pune) APPELLANT
(Orig. Complainant)

VERSUS

1. SHRI MAHADEO ANANT GOGATE)
R/o, 977, Aai Peth, Sangli)
2. SHRI ANANT JANARDAN PHADTARE)
R/o 765, Sadashiv Peth)
PUNE 411 030.) .. (Orig.Accused)
3. THE STATE OF MAHARASHTRA) .. RESPONDENTS

Mr. R. S. Khadapkar h/f R. G. Ketkar for appellant
Mr. A. G. Damle for R-2
Mrs. M. M. Deshmukh, APP

CORAM: **SMT. RANJANA DESAI, J.**

DATE: 22/8/2007.

ORAL JUDGMENT:

. The original complainant has challenged in this criminal appeal judgment and order dated 21/4/94 passed by the Judicial Magistrate First Class (PMC)

Pune, in Summary Case No. 28 of 1986. Respondent 1 and 2 are original accused 1 and 2 respectively. Respondent 1 is dead. Hence the present appeal has abated as against him. Needless to say that so far as respondent 2 is concerned it survives. For convenience I shall refer to the accused as per their description in the trial.

2. The case of the complainant who was at the relevant time working as Checking Naka Inspector in the Octroi Department of Corporation Pune, is that on 6/8/88 the Flying Checking Squad of the Octroi Department found the accused carrying some boxes in an autorickshaw. Hence the said authorickshaw was followed by a jeep by the Flying Squad. At Aniket Society Bibwewadi the boxes were being unloaded. The Flying Qquad asked for the receipt of octroi. It was not produced by the owner of the watches. Therefore, the autorickshaw was brought to Nava Pul Naka. There the owner was directed to produce the documents and to pay the octroi. He did not produce any documents, therefore, Hadap Pavati was issued.

3. It appears that a suit was filed by accused 1 seeking release of the goods. As per court’s

direction octroi amount of Rs.3,607.80 was paid by accused 1 and the goods were released. Thereafter the complainant was directed by the Octroi Department to file prosecution against the accused. Pursuant thereto complaint came to be filed in the court of Judicial Magistrate First Class, Pune, alleging offence under Section 398 of the Bombay Provincial Municipal Corporation Act 1949 ("The BPMC Act" for convenience) against the accused.

4. In support of its case the Octroi Department examined the complainant Sashikant Barathe and Shankar Bankar, who was also attached to the Octroi Department. The defence of the accused was one of denial. After perusing the evidence on record, the learned Magistrate was of the view that the prosecution has failed to prove its case beyond reasonable doubt. He, therefore, acquitted the accused. This order of acquittal is challenged in this appeal.

5. I have heard at some length Mr. Khadapkar, learned advocate for the appellant/complainant, Mr. Damle, learned advocate for the 2nd respondent/original accused 2 and Mrs. Deshmukh, the learned APP.

6. Mr. Khadapkar, learned advocate for the appellant has strenuously contended that the impugned judgment and order is perverse and deserves to be set aside. He submitted that accused 2 was driving autorickshaw which was loaded with watches. The learned advocate urged that it is clear from the evidence on record that accused 2 had the knowledge that the autorickshaw was carrying watches and that octroi was not paid. Mr. Khadapkar drew my attention to Section 147 of the BPMC Act which contains presumption. He submitted that, as per this provision, if any goods are imported into the city unless the contrary is proved they shall be presumed to have been imported for the purposes of consumption, use or sale therein unless such goods are conveyed from the place of import to the place of export by such routes, within such time, under such supervision and on payment of such fees, therefor as shall be determined by the standing orders. The learned advocate urged that this presumption is squarely attracted to the facts of the present case. He submitted that there is no evidence to indicate that the goods were taken from the place of import to the place of export Via Pune. No export pass is

brought on record by the accused and, therefore, no other inference is possible except that the goods were brought in Pune City for the purposes of consumption, use or sale without paying octroi.

7. Mr. Khadapkar drew my attention to the relevant standing orders of the Pune Municipal Corporation. He particularly relied on Standing Orders 4,5,8 and 11. He pointed out that as per Standing Order 4, every person bringing goods into Octroi Limits of the Corporation has to stop at the Import Naka to enable the Import Naka Officer to ascertain whether the goods in the possession of the said person are liable to octroi. Relying on Standing Order 5 he urged that every driver of the vehicle or conveyance of any nature whatsoever shall stop his vehicle or conveyance at the Import Naka to enable the Import Naka Officer to ascertain whether the said vehicle or conveyance contains any goods liable to octroi. He submitted that, therefore, accused 2 cannot avoid his liability by saying that he is merely a driver. He further pointed out that under Standing Order 8, every person in charge of the goods that are being imported into the Octroi Limits for consumption, use or sale has to at the time of import duly fill

in and deliver to the Import Naka Officer, a declaration under his signature in the form prescribed in Schedule 'A'. He pointed out that as per Standing Order 11, every person bringing goods into the Octroi Limits has to produce the original invoice relating to the goods.

8. Drawing my attention to Rule 8 of the Octroi Rules, Mr. Khadapkar contended that octroi is payable on demand by the person in charge of the goods on which octroi is leviable. He also relied on Rule 13 under which, in case of non-payment of any octroi on demand by any person authorised in this behalf by the Commissioner such person may seize the goods on which the octroi is chargeable which are in his opinion of sufficient value to satisfy the demand together with the expenses incidental to the seizure, detention and eventual sale, if necessary, of such goods or part thereof and may detain the same and give a list of the property together with a written notice to the said person.

9. The learned advocate contended that it was, therefore, obligatory on the accused to stop at the check naka, disclose the goods which they were

carrying and pay the octroi. The formalities prescribed under the rules had to be complied with. Admittedly the accused have failed to do so and, therefore, Section 398 of the BPMC Act is clearly attracted and the learned Magistrate erred in acquitting the accused.

10. The learned advocate heavily relied on the judgment of this court in **Hari Pandurang Bhave v. Sonba Kondiba Bankar & Ors., 2000(2) M.L.J. 613**, where this court has held that since the respondents had evaded payment of octroi duty on the goods imported within the Municipal limits with the intention of defrauding the Corporation penalty under Section 398 of the BPMC Act is attracted and when any person imports the goods within the Municipal limits clandestinely and without disclosing about the same to the authorities by making a declaration in a prescribed form, there is no question of making any demand for the payment of octroi duty. In case no such declaration is made, there is no question of making any demand under Rule 23.

11. Mr. Khadapkar also relied on the judgment of this court in **Dnyanoba Vithoba Thigle v. Ashok**

Eknath Saste & Ors., 1993 MLJ 1304. He pointed out that in that case tempo belonging to accused 2 was driven by accused 1. The tempo sped past the check naka without paying octroi. This court set aside the order of acquittal and held that the accused were liable for offence punishable under Section 398 of the BPMC Act. Mr. Khadapkar submitted that, therefore, driver is also liable for offence under Section 398. Mr. Khadapkar submitted that in the circumstances, the trial court erred in acquitting accused 2.

12. Mr. Khandeparkar contended that the trial court's judgment runs counter to the view taken by this court in the aforementioned judgments. He pointed out that the trial court erred in taking a view that there was no proper notice given to the accused calling upon them to pay the octroi. The learned Magistrate erred in observing that there was breach of rules. He submitted that on such flimsy ground the accused could not have been acquitted without noticing the presumption under Section 147 of the BPMC Act. He, therefore, submitted that the order of acquittal be quashed and set aside and accused 2 may be convicted in accordance with law.

13. Mr. Damle, learned advocate appearing for the 2nd respondent/accused 2 on the other hand submitted that the impugned order of acquittal cannot be characterised as perverse warranting any interference by this court. In support of this submission he relied on the judgment of the Supreme Court in **Jimmy Homi Bharucha v. State of Maharashtra, AIR 1977 SC 1213**. The learned advocate contended that accused 2 is merely a driver. There is nothing on record to indicate that he was a party to the alleged attempt to evade octroi duty. He submitted that intention is a very vital ingredient of Section 398 of the BPMC Act. If the intention is found absent the accused cannot be convicted for the said offence. He submitted that the judgments on which reliance is placed by the appellant are not applicable to the facts of this case. He submitted that judgment of this court in **Hari Pandurang Bhave's case (supra)** in fact strengthens his submission that intention is a vital ingredient of Section 398 of the BPMC Act. In the circumstances the learned advocate prayed that the appeal be dismissed.

14. It is well settled that unless the order of

acquittal is perverse it is not to be interfered with by this court. If the view taken by the trial court is a reasonably possible view this court cannot set it aside and substitute its own view in place thereof even if it is possible to take the said other view on the facts of the case. Reliance placed by Mr. Damle on the judgment of the Supreme Court in **Jimmy Bharucha's case (supra)** is apt. In that case while dealing with the High Court's power to interfere with order of acquittal, the Supreme Court has held that if two views of the evidence are possible and the trial court has taken a view favourable to the accused and acquitted him, the appellate court should not disturb the acquittal merely because it is inclined to take another view.

15. Reference may also be made to the judgment of the Supreme Court in **State of Rajasthan v. Raja Ram, (2003) 8 SCC 180** where the Supreme Court has held that generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The Supreme Court has further observed that the golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence

adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. It is further observed that a miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. The Supreme Court has further observed that the principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. Keeping this principle in mind, I shall approach this case.

16. There is no dispute about the fact that original accused 1 Mahadeo Anant Gogate was the owner of the watches in respect of which octroi was not paid. It is also important to note that accused 2 is the driver of the autorickshaw which was hired by accused 1 for the purpose of transporting the watches. Accused 1 is dead. Appeal filed against him has abated. Therefore,

today before me is the case of the driver whose autorickshaw was hired by the main accused.

17. Section 398 of the BPMC Act reads as under:

> "398. Where any vehicle, animal or goods imported into the limits of the City are liable to the payment of the toll or octroi any person who, with the intention of defrauding the corporation, causes or abets the introduction of or himself introduce or attempts to introduce within the limits of the City any such vehicle, animal or goods upon which payment of the toll or octroi due on such introduction has neither been made nor tendered, shall, on conviction, be punished with fine which may extend to ten times the amount of such toll or octroi or to two hundred and fifty rupees, whichever may be greater."

A bare reading of this Section makes it clear that evasion of octroi duty with intention of defrauding the Corporation is the basic ingredient of this Section. Intention has to be proved and in a given

case it may be very much evident from the record of the case.

18. It is, therefore, necessary to scrutinise the evidence adduced by the prosecution in this case to find out whether accused 2 had the knowledge that watches which were kept in his autorickshaw were meant for consumption in the city of Pune and that octroi on the said watches was not paid and payment thereof was to be evaded.

19. In this connection it is necessary to first have a look at the complaint. In paragraph 8 of the complaint it is stated that accused 1 is a businessman and carries on business of sell of watches. It is further stated that accused 2 is a driver and on the relevant date the goods were brought in the rickshaw driven by accused 2. It is further stated that the accused had knowledge about the provisions of the BPMC Act and the rules and the standing orders and they have intentionally defrauded the Corporation by not paying octroi.

20. So far as this later part as regards knowledge and intention are concerned, no further particulars thereof are given in the complaint. It is

necessary to see whether the evidence on record bears out this case of the complainant. It is pertinent to note that the complainant has in his evidence stated that autorickshaw was followed by the Flying Squad and when the goods were being unloaded at Aniket Society and when the Flying Squad asked for the receipt it was not produced by the owner of watches. After that the complainant has stated that he failed to produce the documents and he failed to pay the octroi. Obviously the statement refers to accused 1. It is further stated that the suit was filed by accused Gogate for seeking order of release of the goods. The entire examination-in-chief contains reference to only accused 1, who was the owner of the watches. Neither Sashikant the complainant nor Shankar Bankar, the second witness who was also member of the Flying Squad has stated that accused 2 was in any way concerned with the import of the goods; that he took part in evading the octroi or that he was to get any benefit out of such evasion. In fact there is absolutely no evidence on record from which it can be inferred that accused 2 had the knowledge or the requisite intention which is the important ingredient of Section 398 of the BPMC Act. There is no evidence to establish that

accused 2 sped past the check-naka. Therefore, the trial court committed no irregularity or impropriety in acquitting accused 2.

21. I have carefully perused the octroi rules and the standing orders to which my attention is drawn by the learned advocate for the appellant. Undoubtedly a person who brings the goods within the limits of Pune Municipal Corporation for the purpose of consumption or sale has to stop at the octroi naka and declare the goods. He has to follow the required procedure. Being the importer it can be said that it was accused 1's duty to follow the procedure, declare the goods and pay octroi. But in the facts of this case without there being any evidence on record, in my opinion, it is not possible to say that the alleged breach of all these rules and standing orders can be taken against accused 2. About his intention there is no evidence on record. Heavy reliance is placed by Mr. Khadapkar on Rule 12 of the octroi rules where importer is defined, which reads thus;

. "(12) 'Importer' shall mean the person who is shown as an Importer in the Import Bill and shall also include a person who is to be deemed to be an

Importer according to the provisions contained in the Standing Orders."

22. The learned advocate wants to contend that having regard to the other provisions particularly Standing Order 5 to which my attention is drawn by him, Rule 12 should be construed to mean that the driver is a deemed importer. I am afraid that in the facts of this case it is not possible to include accused 2 in the category of deemed importer. As I have already stated there is nothing on record to indicate that he was a party to the octroi evasion. Both the witnesses whom the complainant has examined have not said a word about accused 2 in their evidence. In such circumstances I am unable to characterise accused 2 as a deemed importer and hold him guilty for offence under Section 398 of the BPMC Act, where intention is an important ingredient. This submission of the learned counsel must, therefore, fail.

23. Reliance placed on the judgment of this court in **Hari Pandurang Bhave's case (supra)** is misplaced. In that case this court was basically concerned with the question of demand. The question was whether the trial court was right in

observing that when there was no demand under Rule 23 of the Octroi Rules for payment of octroi duty, the respondents were not liable to pay octroi. It is in this context that after considering the relevant rules this court observed that if goods are imported within the Municipal limits clandestinely and without disclosing about the same to the authorities by making a declaration in the prescribed form as per Schedule "A" under Standing Order 8, there is no question of making any demand for the payment of octroi duty. This judgment does not deal with the question of intention.

24. So far as the judgment of this court in **Dnyanoba Thigle's case (supra)** is concerned, that judgment, in my opinion, strengthens the submission that conviction under Section 398 cannot be fastened on a person unless it is shown that evasion of duty was done with intention of defrauding the Corporation. In that case the tempo belonging to accused 2 was driven by accused 1 into the Pune City. The tempo sped past octroi naka without stopping or paying octroi. A group of activists then brought the tempo to the Corporation building and thereafter the goods were seized under a hadap notice. The facts of this case indicate

that both the accused had the intention to defraud the Corporation. The driver by speeding past octroi naka made this intention very clear. Unless the owner had told the driver that there were certain goods in the tempo in respect of which octroi was not to be paid and, therefore, the truck should not stop at octroi naka, the driver would not have done so. This itself indicates that both driver and the owner were party to an attempt to defraud the Corporation. It is pertinent to note that while dealing with the submission which was advanced on behalf of the accused that to sustain a conviction under Section 398 of the BPMC Act, intention to defraud has to be established, this court observed that vehicle did not stop at the octroi check post and when the law casts a specific obligation on the importer to file a declaration in respect of the goods and to offer the goods for inspection or assessment at the check post, if the requisite formalities are not complied with there can be no intention inferred other than the desire to evade the octroi. Non filing of declaration and speeding past the check post persuaded this court to infer intention to evade octroi. Therefore, this court accepted that intention to defraud must be present before a person can be convicted under

Section 398 of the BPMC Act.

25. Facts of the present case are different. At the cost of repetition it must be stated that there is no evidence that accused 2 had intention to defraud the Corporation. There is no averment in the complaint or a statement in the evidence that accused 2 sped past the check post. Judgment in **Dnyanoba Thigle's case** has, therefore, no application to the present case.

26. In the circumstances, in my opinion, no interference is necessary with the impugned judgment and order. In my opinion the view taken by the trial court is a reasonably possible view. It is the only view possible on the facts before the trial court and hence it does not deserve to be disturbed in this appeal against order of acquittal. There is, therefore, no merit in the appeal, and hence it is dismissed.

JUDGE.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL WRIT PETITION NO. 1988 OF 2006

DATE ON WHICH THE JUDGMENT IS

RESERVED : 14TH JUNE, 2007

DATE ON WHICH THE JUDGMENT IS

PRONOUNCED:_____TH JULY,2007

Transcription of
Judgment / Order.

Submitted for
approval.

THE HON'BLE (SMT.) JUSTICE RANJANA DESAI:

THE HON'BLE SHRI JUSTICE : D. B. BHOSALE:

1. Whether Reporters of Local Papers)
be allowed to see the Judgment?)

2. To be referred to the Reporters or)

not?)

3. Whether Their Lordships wish to)
see the fair copy of the Judgment?)

4. Whether this case involves a)
substantial question of law as to)
the interpretation of the)
Constitution of India, 1950 or any)
Order made thereunder?)

5. Whether it is to be circulated to)
the Civil Judges?)

6. Whether the case involves an impor-)
tant question of law and whether)
a copy of the judgment should be)
sent to Nagpur, Aurangabad and Goa)
Offices?)